

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 727 of 1986

For Approval and Signature:

Hon'ble MR.JUSTICE M.S.PARIKH

- =====
1. Whether Reporters of Local Papers may be allowed to see the judgements?
 2. To be referred to the Reporter or not?
 3. Whether Their Lordships wish to see the fair copy of the judgement?
 4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
 5. Whether it is to be circulated to the Civil Judge?

YUSUF MUSTAFA SHEIKH & 4

Versus

STATE OF GUJARAT

Appearance:

MR ADIL MEHTA for Petitioner

MR SP DAVE, LD APP for Respondent No. 1

CORAM : MR.JUSTICE M.S.PARIKH

Date of decision: 20/02/98

ORAL JUDGEMENT

1. The accused, appellants herein, stood charged with the offences punishable u/S. 307 as also u/Ss. 147, 148 and 149 of the Indian Penal Code (for short 'IPC'), in the alternative u/S. 307 read with section 34 of the IPC, in the alternative u/S. 324, 323 of the IPC, read with sec. 135 of the Bombay Police Act, in Sessions

2. The learned Addl. Sessions Judge, Surat by impugned judgment and order dated 5/6/1986 passed following order :-

"Each of the convicted persons is hereby sentenced to undergo rigorous imprisonment for 4 (four) years and to pay a fine of Rs.100/- (Rs. hundred only) for the commission of offences punishable u/S. 326 r/w 149 of the I.P.C. In default, the defaulter shall undergo rigorous imprisonment for three months.

2. Each of the convicted persons is hereby sentenced to undergo rigorous imprisonment for six months and to pay a fine of Rs.50/- (Rs. fifty only) for the commission of offence punishable u/S. 324 r/w 149 of the I.P.C. In default, the defaulter shall undergo rigorous imprisonment for one month.

3. Each of the convicted persons is hereby sentenced to undergo rigorous imprisonment for one month and to pay a fine of Rs.50/- (Rs. fifty only) for the commission of offence punishable u/S. 323 r/w 149 of the I.P.C. and in default the defaulter shall undergo rigorous imprisonment for 7 (seven) days for the said offence.

4. Each of the convicted persons is hereby sentenced to undergo rigorous imprisonment for 3 (three) months and to pay fine of Rs.50/- (Rs. fifty only) for the commission of offence punishable u/S. 147 of the I.P.C. In default, the defaulter shall undergo rigorous imprisonment for 7 (seven) days.

5. Each accused Hamid Gulam, Hussain Gulam and Shokat Usuf is hereby sentenced to undergo rigorous imprisonment for 4 (four) months and to pay fine of Rs.50/- (Rs. fifty only) for the commission of offence punishable u/S. 148 of I.P.C. In default the defaulter shall undergo rigorous imprisonment for 7 (seven) days for the said offence.

6. I hereby further order that all the substantive sentences of the imprisonment imposed on each of the convicted person as above shall

run concurrently.

7. Muddamal axe, Dhariya, Iron rod and stick are hereby confiscated to the State of Gujarat and I hereby order that these muddamal weapons be sold by public auction and proceeds thereof be remitted to the Government of Gujarat.
8. Muddamal clothes be returned to the persons from whom they are seized. Muddamal blood stained earth and control earth be disposed of by destroying them."

The accused persons have challenged the aforesaid judgment and order of conviction and sentence before this Court in this appeal.

2. As per the prosecution case it so happened that on or about March 30, 1985 at about 7.45 p.m. at village Siyalaj, Taluka Mangrol, District Surat all the accused persons being the members of unlawful assembly approached the place opposite the house of the complainant Ikbal Ismail with the common object of causing death of the witnesses Safruddin Ismail, Abdul Karim, Haidarkhan Mahmadvkhan and Ayubkhan Haidarkhan by causing simple and grievous injuries to them. At that time accused Hamid Gulam was armed with Dhariya, accused Hussain Gulam was armed with axe, accused Usuf Mustafa was armed with the stick, accused - Shokat was armed with Parai, hereinafter referred to as 'iron rod' and accused - Liyakat made himself armed with stone/s. They assaulted the complainant party in pursuance of the said common object of the unlawful assembly and accused Hamid Gulam inflicted Dhariya blow on the left hand of Sadruddin Ismail and on the left shoulder of Abdul Kalam, accused Husain Gulam voluntarily inflicted axe blow on the head of Haidarkhan Mahmadvkhan and another blow on the right hand thumb of Haidarkhan, accused - Usuf Mahmadvkhan inflicted stick blows on the fore-head of Abdul Kalam and accused Shokat inflicted iron rod blows on the head of Ayub Haidarkhan and accused - Liyakat Usuf hurled stones at Abdul Kalam. They in the process caused injuries, as will hereinafter be particularised, to the concerned member of the complainant party. However, Haidarkhan was caused grievous hurt on account of head injury caused by axe blow. The prosecution story might a little be elaborated. In village Siyalaj, Taluka Mangrol, District Surat there is a locality known as 'Masjid Falia', where complainant Ikbal Ismail alongwith his brothers and parents reside. The house of the accused Husain Gulam is

located in the said Falia (lane) after leaving one house from the house of the complainant. Usuf Mustafa was also residing in this lane. There are houses of Gulam Rahim, Akber Mahmad, Usuf Karim and other persons in the said lane after leaving street land of about 15 ft. in between. Complainant Ikbal Ismail was at home on 29/3/1985. The work of construction of the cabin of one Nasruddin Karim was going on in the vicinity of the house of the complainant at mid night and a tape recorder was being played with loud voice. Ikbal Ismail therefore, got up, went to Nasruddin Karim Shaikh and asked him to play the tape recorder keeping the voice low down so that sleep of other people might not be disturbed. Nasruddin Karim acceded to the suggestion of playing the tape recorder slowly and he, therefore, stopped playing the tape recorder. At about 7.50 p.m. on 30/3/1985 Ikbal Ismail was having his dinner inside his house and his two brothers namely, Sadaruddin Ismail and Abdul Kalam Ismail were sitting on the Otta (plat form) of their shop. At that time the accused Husain Gulam and others approached that place and asked Abdul Kalam Ismail and Sadaruddin why on the previous night Nasaruddin Karim was caused to stop playing the tape recorder. They also asked who would dare to get stopped playing of the tape recorder on the previous day. So saying he started giving abuses to Sadaruddin Ismail and Abdul Kalam Ismail. Ikbal Ismail heard the utterances of abuses. This resulted in hot exchange of words between the persons of both the sides. The accused got excited and launched the assault as aforesaid. At first Hamid Gulam inflicted Dhariya blow on the left hand of Sadaruddin Ismail and on the shoulder of Abdul Kalam causing them injuries. Upon hearing the shouts which were raised as a result of the assault, Haidarkhan Pathan and Ayubkhan Pathan rushed at the place and intervened. The accused Husain Gulam remarked why Haidarkhan had intervened and inflicted axe blow on the head of Haidarkhan, who immediately fell down in the bleeding condition. Usuf Mustafa inflicted stick blow on the fore-head of Abdul Kalam and Shokat Usuf inflicted blow with iron rod on the left hand of Ayubkhan Haidarkhan resulting into fracture injury. Liyakat Usuf is alleged to have pelted stones at Abdul Kalam hurting him on the right side of his eye. Hearing the voice at the place of occurrence Yakub Haidarkhan Pathan, Basir Chhitu, Mohiyudin Chhotu and Ikbal Ismail reached the scene of offence, they intervened and saved the persons from being further hurt. The accused persons ran away with the weapons. Haidarkhan having become unconscious was taken in a truck by Sadaruddin Ismail, Abdul Kalam Ismail, Haidarkhan Mahmadkhan, Yakub Mahmadkhan and Ikbal Ismail. They went to Kosamba Out-post first, obtained a

police Yadi therefrom and reached Valechha Primary Health Centre, where Dr. Kishorbhai Kantilal Soni, the Medical Officer on duty examined the injured persons at about 10.05 at night on the same day, noted their injuries, issued necessary certificates and referred Haidarkhan to New Civil Hospital, Surat on the same day for further treatment and necessary investigation. Sadaruddin Ismail was also referred to New Civil Hospital for treatment and investigation. Accordingly they were removed to New Civil Hospital at Surat and others accompanied them. Dr. Mafatbhai Ranchhodbhai Machhi examined the injured persons, noted their injuries, saw to the X-Ray examination being performed and administered treatment. A fracture was located on the left parietal bone and injury on the thumb of the right hand, left the tip of the thumb black and senseless. That part of the thumb was removed by performing the operation. He was discharged from the hospital on 2/4/1985. In the background of such facts Ikbāl Ismail lodged complaint at about 3 O'clock in the after-noon on 31/3/1985 at Kosamba Out-post. After investigation, charge-sheet was filed and the case was committed to the Sessions Court.

3. It might be noted here that the accused persons had also received injuries during the course of the aforesaid occurrence. Accused Husain Gulam and Hamid Gulam were the injured accused persons. The defence of the accused persons is that in fact they were assaulted and injuries were caused to the aforesaid accused persons. They accordingly filed complaint against Haidarkhan Mohammadkhan, Ayubkhan Haidarkhan Pathan, Abdul Kalam Ismail Shaikh, Yakubkhan Haidarkhan Pathan and Ikbāl Ismail for the offences punishable u/S. 324 , 506 (2) read with sec. 114 of the IPC at about 7.30 to 8.00 O'clock in the evening at the Kosamba Out-post and the persons of the complainant party had been caused injuries by the persons from the people who had collected at the scene of offence.

4. The case was tried before the learned Addl. Sessions Judge. He after recording further statements of the accused persons and hearing the submissions made on behalf of both the sides rendered conviction and sentence as aforesaid; that is how the accused persons are before this Court.

5. I have heard Mr. Adil Mehta, learned advocate for the accused persons, who are appellants herein and Mr. S.P. Dave, Ld. A.P.P. for the State. Mr. Mehta has taken through the oral evidence of the prosecution witnesses and has also referred to the documents which

had been placed on record. According to Mr. Mehta's submissions the prosecution has failed to establish beyond reasonable doubt genesis of the offences charged against the accused persons, accused Liyakat has been falsely implicated in order to make up the unlawful assembly, the complaint was filed by the prosecution at a very belated point of time, whereas the complaint of the accused persons was filed immediately after the occurrence, the injured witnesses have failed to explain the injuries on the accused persons satisfactorily and in the facts and circumstances of the case, this is a case where the prosecution has failed to establish beyond reasonable doubt the offences charged against the accused persons.

6. In reply Mr. S.P. Dave, Ld. A.P.P. for the State submitted that the scene of offence being nearer to the house of the complainant and the aggressors being the accused persons as per the prosecution evidence the conviction and sentence have become unassailable. He submitted that the learned Addl. Sessions Judge has rightly accepted evidence of one of the prosecution witnesses explaining the injuries on the accused persons to some extent. According to his submission the prosecution witnesses have satisfactorily explained the delay caused in filing the complaint by the prosecution party.

7. In order to appreciate the rival submissions it would first be important to set out what are the injuries sustained by the particular injured eye witness as also the particular accused persons. For that purpose reference may be made to the evidence of Dr. Kishorbhai Soni P.W. 1 Exh. 15 and the certificate issued by him and appearing at exh. 16. Accordingly injured eye witnesses (1) Haidarkhan Mohamadkhan, (2) Sadaruddin Ismail, (3) Ayubkhan Haidarkhan Pathan, (4) Abdulkalam Ismail Shaikh went to Dr. Kishorbhai Soni at about 10.05 p.m. on 30/3/1985 with a police yadi from constable of Kosamba Out-post. The witness noticed injuries as under:

(1) Haidarkhan Mohamadkhan Pathan :

- (i) Incised wound oblique 4 1/2" x 1/4" x 1/4"
(approximately) over fronto-parietal scalp region, almost centrally and inclining towards Lt. parietal bone.? fracture of frontal and Lt. Parietal bone.
- (ii) C.L.W. over tip of the Rt. thumb 1" x 1/2" x 1/2".? Fracture of the distal phalanx bone of Rt. thumb.
- (iii) Frank blood seen out from Lt. ear ? Internal cerebral haemorrhage.

The patient has been referred to New Civil Hospital, Surat on 30/3/1985 for further treatment and necessary investigations. The injuries noted above are stated to have been caused by sharp cutting instrument and hard blunt substance respectively.

(2) Sadaruddin Ismail Shaikh :

(i) An incised wound, oblique 3" x 1/4" x 1/4" over lower 1/3rd of Lt. forearm (Dorsally).

(ii) Two incised wounds over dorsum of Lt. hand size 2" x 1/2" x 1/4" and 1/2" x 1/2" x 1/4".

Profused frank bleeding seen from all the above wounds. Damage to the vessels seen.

The patient was referred to the New Civil Hospital, Surat for further treatment and investigation. The injuries have been stated to have been likely to have been caused by sharp cutting instrument.

(3) Aiyubkhan Haidarkhan Pathan :

(i) Incised wound 1/2" x 1/4" x 1/4" over Lt. forearm, dorso laterally with swelling around it. Size about 2" x 2". No fracture of Lt. forearm bones (clinically).

(ii) Abrasion 3" x 1/8" over Lt. Upper arm

(iii) Incised wound over Rt. molar region of cheek 1 1/4" x 1/4" x 1/4" (1" below the Rt. lower eye lid). No fracture of the bones of the face on Rt. side (Clinically).

(iv) C.L.W. 1/2" x 1/4" x 1/4" over tip of the Rt. little finger.

(v) C.L.W. 1/2" x 1/4" x 1/4" over the tip of the Rt. ring finger.

Injuries at serial nos. (i) and (iii) were caused by sharp cutting instrument, while injuries nos. (ii), (iv) and (v) were opined to have been caused by hard and blunt substance.

4. Abdul Kalam Ismail Shaikh :-

(i) Abrasion oblique about 6" long over Lt. scapular region on back

(ii) Sharp cutting wound (Incised wound) 1/4" x 1/4" x 1/6" over Lt. shoulder region about 2 1/2" above the mid clavicular region on Lt. side.

(iii) Abrasion 1/4" x 1/4" over Rt. eye-brow (laterally).

(iv) Swelling over temporo parietal region of scalp on Lt. side, size about 1 1/2" X 1 1/2" with tenderness present and Pinkish contusion 1" X 1/4" seen over it. No fracture of skull bones (clinically).

Injuries nos. (i), (iii) and (iv) are opined to have been

caused by hard and blunt substance, while injury no. (ii) caused by sharp cutting instrument.

8. The doctor while giving the certificate has observed that all the patients were conscious when they were admitted in his Primary Health Centre. He has also observed that Haidarkhan was stated to have been assaulted by Kuhadi (axe), Sadaruddin is stated to have been assaulted by Dhariya, Ayubkhan is stated to have been assaulted by Dhariya, Abdul Kalam is stated to have been assaulted by Dhariya.

At this very juncture the injuries sustained by the accused persons might also be noted. Same doctor has been examined at exch. 51 as defence witness no.1 and according to his medical certificate exhs. 49 and 50 following injuries have been noted :-

(1) Shaikh Husain Gulam Randeri :

- (i) Swelling 2" X 2" size over Rt. Forearm with contusion, Pinkish in colour of 1.1/2" x 1" size over it. Tenderness present. No fracture of Rt. forearm bones clinically.
- (ii) Swelling 2" x 2" over Rt. forearm with contusion pinkish in colour, of size 1" x 1.1/2" over it. Over proximal 1/3rd portion.
- (iii) Swelling 1" x 1.1/2" with abrasion 1/4" x 1/4" over it. Over distal 1/3rd portion of Rt. forearm.
- (iv) Abrasion 1/4" x 1/4" over distal 1/3rd portion of Rt. forearm.
- (v) C.L.W. 2.1/4" X 1/4" X 1/4" and C.L.W. 1.1/2" X 1/4" X 1/4" over occipital scalp region. No fracture of occipital bone clinically.
- (vi) C.L.W. 3" X 1/2" X 1/4" over Lt. parietal scalp region.
- (vii) Swelling over Lt. foot near medial malleolus. Tenderness present ? Fracture of Lt. foot bones.

Patient was referred to New Civil Hospital Surat for further treatment and investigation. Dr. has however opined that the injuries were caused by hard blunt substance. According to his noting the patient was conscious.

(2) Shaikh Abdul Hamid Gulam Randeri :

- (i) C.L.W. 1.1/4" X 1/4" x 1/4" over Rt. Parietal scalp. No fracture of Rt. Parietal bone (clinically).
- (ii) Abrasion 1/4" X 1/4" over Rt. wrist Jt.
- (iii) Abrasion 1" x 1.1/4" over Lt. scapular region on

back

Injuries were opined to have been caused by hard and blunt substance. The doctor has noted that this patient was also conscious.

9. It might further be noted from the medical evidence that the head injury which Haidarkhan sustained was grievous.

10. Having gone through the prosecution evidence as well as the observations of the learned Addl. Sessions Judge on such evidence, I am of the opinion that the incident did occur somewhere nearby the house of the complainant although the house of one of the accused persons was located also in the vicinity. It is also clear that there was some hot exchange of words between the persons of both the parties, which resulted in the fight amongst them. It has been established beyond reasonable doubt from the prosecution evidence that Usuf Mustafa was armed with a stick, accused Shokat Usuf was armed with an iron rod, accused Hamid Gulam was armed with Dhariya and accused Husain Gulam was armed with axe at the time of the incident. It also appears from the prosecution evidence that the injuries sustained by the two of the accused persons do not appear to have been satisfactorily explained by the prosecution and these injuries atleast indicate about free fight between the persons of both the parties at the place of the incident. At the same time the genesis of the incident clearly appears to have been established from the prosecution evidence beyond reasonable doubt. On a reference to the prosecution evidence it can be seen that on a day prior to the day of incident, complainant Ikbāl Ismail had an occasion to ask Nasaruddin Karim to play the tape recorder slowly as loud playing of the tape recorder did cause disturbance to his sleep and the sleep of the people in the neighbourhood. It appears that this incident had caused some psychological reaction to the four accused persons one of whom happened to be attending to the construction work of the cabin. The prosecution evidence clearly reveals that four of the accused persons were armed as aforesaid at the time of the incident. It is no-doubt true that there has also been an assault from the side of the complainant party, but during the course of the incident. In the background of such facts flowing from the prosecution evidence, the injuries sustained by the persons of the complainant party, Haidarkhan in particular, would assume importance. Accused Husain Gulam inflicted axe blow on the head of Haidarkhan which resulted in grievous hurt which Haidarkhan sustained on his head. The nature of the injury has been noted in

brief hereinabove and can be visualised from the medical evidence which has been placed on record.

11. With regard to delay in filing of the complaint by the complainant it clearly appears from the prosecution evidence that the persons of the complainant party including the injured persons had first approached the Kosamba Out-post immediately after the incident and immediately after the concerned persons were injured. The Constable who was present at the Out-post, finding that one of the persons was seriously injured, immediately managed to give a Yadi for the injured persons being taken to the Primary Health Centre. The Yadi is at exh. 17. This would reflect that the complainant and the injured persons had been first to the police and then to the Primary Health Centre. It also appears from the prosecution evidence that they had been busy with the treatment of the injured persons all throughout the night and the following day till upto 3.00 O'clock in the after-noon when the complainant happened to have filed the complaint. Therefore, the challenge to the explanation of delay having been accepted by the learned Addl. Sessions Judge cannot be countenanced.

12. It, however, appears from the prosecution evidence that there is a sort of exaggeration in implicating Liyakat Shaikh by attributing him having pelted stones or having hit stone/s to the concerned eye witnesses. Reference in this connection may first be made to first the evidence of the complainant P.W. 5 Ikbal Ismail exh. 28. During the course of his examination-in-chief this witness has deposed that Liyakat was standing. However, he has not attributed him having been pre-armed with stone. While describing the incident the witness has deposed that Liyakat had pelted the stones at the right hand of Abdul Kalam and on the left cheek of Ayubkhan Haidarkhan. Developing the story with regard to assault by stone, the witness has deposed that Hamid Gulam was hurt on his head through the stone hurled by Liyakat Usuf, who pelted stones and injured Hamid Gulam. In his cross-examination the witness has deposed that he did not have any idea as to who was aimed at by Liyakat while pelting the stone/s, although he was at a distance of about 5 ft. opposite Hamid and although he did not have any idea as to who were standing around him when the stone hurt the concerned injured eye witness. He also admitted that he did not have any idea about how big was the stone and whether the stone injury resulted in bleeding or not. A suggestion was made in his cross-examination that he did not state in his complaint about Liyakat having hurt Ayubkhan Usuf on his

left cheek with the stone.

13. P.W. 7 Abdul Kalam Ismail exh. 31 has deposed that there were four accused persons, namely, Husain Gulam Randeri armed with an axe, Abdul Hamid Gulam armed with Dhariya, Usuf Mustafa Shaikh armed with stick and Shokat Usuf armed with an iron rod. He has not named Liyakat as one of the persons approaching the witness. According to this witness Liyakat afterwards started pelting of stones and he was hurt near the right eye brow with stone. P.W. 8 Sadaruddin Ismail exh. 32 has deposed that Liyakat was holding stones in his hands when the accused persons approached the complainant party as aforesaid. According to his say Liyakat Usuf had struck Abdul Kalam with the stone injuring the portion below right hand. He had given second stone blow on the right cheek of Ayubkhan, who was bleeding as a result thereof. In his cross examination he admitted that he did not have any idea about he having stated before the police regarding Ayubkhan having sustained injuries as a result of stone throwing from Liyakat or as a result of Liyakat striking Ayubkhan with stone. Haidarkhan P.W. 10 exh. 34 has deposed that sons of Ismailbhai and Husain Gulam, Hanif Gulam, Usuf Mustafa, Liyakat and Shokat were fighting and at that time he was busy with his cattle being fed with the grass. P.W. 11 Bashirbhai Chhotubhai exh. 35 has stated nothing about accused Liyakat pelting stones. However, P.W. 12 Yakubkha Haidarkha exh. 36 has deposed that when he went to the scene of offence he saw Liyakat pelting stones one of which hurt Abdul Kalam near his right eye and one of which hurt Ayubkhan on his right cheek. He has, however, been referred to his omission regarding his statement that Ayubkhan was bleeding as a result of stone injury on his cheek. It might be noted that Ayubkhan had gone to the scene of offence a little later than the commencement of the fight and Haidarkhan having already been injured. Haidarkhan has not stated about Liyakat pelting stones. This makes Yakubkhan's version about the injuries caused by stone throwing unnatural. It is not in dispute that quite a sizeable number of persons had collected at the scene of offence. It is also not in dispute that there was a free fight and the distance attributed to Liyakat for throwing stones is not as much as would leave Liyakat picking up stones and aiming them at the concerned persons. Even if there were injuries on account of stone throwing as alleged by the aforesaid witness, although the medical evidence is silent about the same, the possibility of persons from the crowd throwing stones at the persons fighting cannot be ruled out. Thus, the nature of the prosecution evidence and the prosecution story with

regard to the manner in which the incident had occurred, as also the extent of open space in front of the respective houses would indicate that there might be possibility of the persons from the crowd throwing stones at the persons fighting inter-se. It is possible that stone throwing might have been resorted to at the time of the incident. However, the prosecution appears to have exaggerated its case with regard to Liyakat being included in the aggressors probably for making up five persons. It might be seen that the accused persons had already filed a complaint prior to the complaint in question having been filed by the complainant and in the complaint filed by the accused party five persons of the complainant party were implicated. Therefore, the possibility of counter implicating five persons in the complaint filed by the complainant cannot be ruled out. The very fact that Liyakat was not armed with any weapon would indicate that he might have been brought in as aforesaid. Liyakat is the son of accused no. 1 Usuf Mustafa Shaikh. That being Liyakat's relation with Usuf Mustafa, who held stick, might have prompted the complainant to implicate Liyakat. The learned Addl. Sessions Judge appears to have failed to closely scrutinize the prosecution story with regard to Liyakat holding or picking up or striking or pelting stone/s. Having gone through the evidence which has been read before me as also the judgment of the learned Addl. Sessions Judge, I am of the opinion that a reasonable doubt is thrown on the prosecution story implicating Liyakat as one of the aggressors.

14. At this stage reference needs be made to the defence evidence which would indicate even the persons of the complainant party indulging in causing injuries to two of the accused persons, may be during the course of the incident. Over and above, Dr. Kishorbhai Soni who has been examined as defence witness no. 1 at exh. 51 and over and above his medical certificate exhs. 49 and 50 in respect of accused nos. 5 and 3 respectively, the defence has also examined Dr. Salim Ahmed Patel of Kosamba General Hospital in respect of the injuries which were caused to Shaikh Husain Gulam Randeri. Investigating Officer Manilal Parshotambhai Vasava has been examined as defence witness no. 3 at exh. 38. Referring to the complaint given by the accused persons against persons of complainant party at an earlier point of time he has deposed that on 31/3/1985 between 7.30 and 8.00 O'clock in the morning he had prepared Panchnama of the scene of offence as suggested by the accused persons of the present case (complainant persons) and recorded the statements of the witnesses Sadik Mohmad Shaikh,

Nasruddin Karim Shaikh and others. He also deposed about recovery of Dhariya from Haidarkhan Mohmadkhan, one of the injured witnesses in this case. A reference to this defence evidence is required to be made for the reason that a criminal case had been filed and registered as Criminal Case No. 165/1986 in the Court of the Judicial Magistrate First Class at Mangrol (District Surat). That was a case registered for the offence punishable u/Ss. 324, 506 and 114 of IPC. Unfortunately after the impugned judgment and order came to be recorded by the learned Addl. Sessions Judge and during the pendency of this appeal that Criminal Case against the persons of the complainant party who were accused there had been compounded. In my opinion, this would have obviously adversely affected the accused persons herein. In so far as the hearing of the present appeal is concerned, they could have pointed out species of evidence before this Court had the matter gone for trial before the learned Magistrate. However, during the pendency of this appeal the parties compounded the said case as per certified copy which has been placed on record of the present appeal by consent of the learned counsels appearing for the rival sides. It is dated 23/12/1989. It also refers to the settlement of the present case also, but the learned Magistrate, and in my opinion rightly, did not allow that part of the settlement to be recorded in the case before the learned Magistrate. The fact remains that there has been a settlement with regard to both the cases between the parties, this appeal included. Apparently this will have direct consequence upon the question regarding sentence.

15. Mr. Mehta then referred to certain discrepancies appearing in the evidence of the prosecution witnesses, injured eye witnesses in particular. In the light of such discrepancies Mr. Mehta's submission was that the injured eye witnesses were interested witnesses and inspite of the fact that so many persons had collected at the scene of offence at the time of incident no independent witness has been examined. In this connection Mr. S.P. Dave, Ld. A.P.P. for the State has made a reference to a decision of Hon'ble Supreme Court in the case of Appabhai v. State of Gujarat reported in AIR 1988 S.C. 696, where it has been observed that the prosecution has not been able to produce any independent witness to the murder that took place at the bus stand. But the prosecution case cannot be thrown out or doubted on that ground alone. It has further been observed that civilized people are generally insensitive when a crime is committed even in their presence. They withdraw both from victim and the

vigilante and keep themselves away from the Court unless it would be inevitable. Hence, the Court must bear in mind that instead of doubting the prosecution case for want of independent witnesses, it must consider the spectrum of the prosecution version and try to search for the nugget of truth with due regard to probability, if any, suggested by the accused. In the present case the probability suggested on behalf of the accused persons is that some persons from the people collected at the scene of offence might have re-acted and assaulted the persons of the complainant party. This defence in the light of the prosecution evidence which has been discussed at length by the learned Addl. Sessions Judge does not sound probable. At the same time the submission that there was exchange of hot words, there was exchange of free hands and there was ultimately a free fight deserves consideration, but more so on the question of sentence.

16. Finally, Mr. S.P. Dave, Ld. A.P.P. referred to a decision in the case of Hare Krishna Singh v. State of Bihar reported in AIR 1988 SC 863 for the proposition that the obligation of the prosecution to explain the injuries sustained by the accused in the same occurrence may not arise in each and every case. It is true this is not an invariable rule. Presence of the type of injuries which the two of the accused persons have sustained in the present case would speak for itself and that would assume great deal of importance while considering the question of sentence.

17. In the result the impugned judgment and order of conviction as aforesaid is hereby altered to the conviction of accused Yusuf Mustufa Shaikh, Shokat Uyuf Shaikh, Abdul Hamid Gulam Randeri and Husain Gulam Randeri to one u/S. 326 read with sec. 34 of the IPC, setting aside their conviction under other provisions referred to by the learned Addl. Sessions Judge. However, their conviction u/S. 324 read with sec. 34 and u/S. 323 read with sec. 34 of the IPC will stand confirmed. Rest of the conviction will stand set aside. The conviction of accused no. 4 - Liyakat Usuf Shaikh is hereby set aside and he is acquitted of the offences charged against him. His bail bond shall stand cancelled on account of such acquittal.

: SENTENCE :

I have also heard the learned advocate appearing for the four accused, who have been convicted as aforesaid and Mr. S.P. Dave, Ld. A.P.P. for the State. Detailed circumstances which would bear a great deal of relevance on the question of sentence can not

only be noticed from the evidence placed on record and the judgment of the learned Addl. Sessions Judge, but they have also been highlighted in the foregoing discussion of evidence. The most important circumstance is that the parties had compounded the offence in the complaint filed by the accused persons against the persons of the complainant party in Criminal Case No. 165 of 1986 before the learned Judicial Magistrate First Class, Mangrol, District Surat during the pendency of this appeal. They have also made a reference to the settlement of this appeal. However, there is no question of allowing settlement to go on record as such, but that would have a great deal of impact on the question of sentence. Reference in this connection has first been made to a decision of the Apex Court contained in the case of Mahesh Chand v. State of Rajasthan reported in AIR 1988 SC 2111 where although the offence was not compoundable under law, the parties were permitted to pray before the Apex Court to treat that as a special case and permission to compound the case was granted in the facts of the case before the Hon'ble Supreme Court. That was a case where two counter cases were before the Court and one of the counter cases was already compromised. Earlier decision in the case of Suresh Babu v. State of A.P. reported in (1987) 2 JT 361 had also been referred to in support of the plea for permission to compound the offence. Under such circumstances, the trial Court was directed to accord permission to compound the offence after an opportunity to the parties and after even being satisfied with regard to compromise agreed upon between them. In my opinion, the aforesaid decision of the Apex Court would merit consideration while dealing with the question of sentence. In the present case accused - Usuf Mustafa Shaikh underwent total period of sentence to the extent of 1 .1/2 months including the undertrial period, accused Shokat Usuf Shaikh underwent sentence of nearly 5 months including the under trial period, accused - Abdul Hamid Gulam Randeri also underwent the sentence of nearly 5 months including the undertrial period and accused - Hussain Gulam Randeri also underwent sentence of nearly 5 months including the undertrial period. In my opinion ends of justice would be served if sentence under the aforesaid provisions under which they have now been convicted, is reduced to the period undergone including the default sentence. However, each of the 4 accused shall pay fine of Rs.500/totalling to Rs.2,000/-. They shall deposit fine in the trial Court within four weeks from today. On their failure to deposit the fine, it would be open to the State to effect recovery thereof.

This appeal will accordingly stand partly allowed
in the aforesaid terms.

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PVR cr.72786j.